Leukemia and Lymphoma Society *and* Brittany Lynn Doering. Case 16–CA–152958

February 17, 2016

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 29, 2015, the General Counsel issued a complaint alleging that the Respondent, Leukemia and Lymphoma Society, violated Section 8(a)(1) of the Act by terminating its employee, Charging Party Brittany Lynn Doering, for engaging in protected concerted activity, and by maintaining several overbroad handbook rules. The Respondent filed an answer denying the complaint allegations and, on November 10, 2015, filed a Motion to Dismiss the complaint allegations concerning its handbook rules, with supporting argument. The General Counsel filed an opposition, and the Respondent filed a reply to the opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Respondent's Motion to Dismiss is denied. We find no merit in the Respondent's contention that the Board lacks jurisdiction over this matter under Section 10(b) of the Act. The General Counsel's investigative procedure on which the Respondent's motion relies conforms to Section 10062.5 of the NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings.[1]

Dated, Washington, D.C., February 17, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Our concurring colleague agrees that the Respondent's motion to dismiss allegations that it violated Sec. 8(a)(1) by maintaining overbroad handbook rules should be denied. Therefore, we need not address the other matters that he discusses.

MEMBER MISCIMARRA, concurring.

In this case, the Region conducted an investigation into a charge filed May 22, 2015, alleging that the Respondent unlawfully discharged an employee, Brittany Doering, in violation of Section 8(a)(1) of the Act. Respondent has filed a motion to dismiss, arguing that the Board lacks jurisdiction over the complaint's broader allegations challenging Respondent's employee handbook provisions. Specifically, Respondent contends (i) that the complaint's allegations regarding the employee handbook were unrelated to the May 22, 2015 charge; (ii) that the Region engaged in an evaluation of Respondent's employee handbook, at its own initiative, pursuant to instructions from the Board's General Counsel;[1] (iii) that the Charging Party, at the Region's suggestion or direction, subsequently filed an amended charge dated June 23, 2015, encompassing the alleged handbook violations; and (iv) that the amended charge, in turn, became the basis for handbook allegations in the complaint issued by the Region. Respondent also maintains that the complaint's handbook allegations are barred by the six-month limitations period set forth in Section 10(b) of the Act.

At this point, the Board does not have a record that reflects precisely what occurred during the Region's investigation. For this reason, I concur in the denial of Respondent's motion to dismiss.

However, my colleagues appear to do more than merely deny the Respondent's motion to dismiss. They appear to reject the Respondent's arguments on the merits.[2]

[1] The Respondent relies on General Counsel Memorandum 15–05, which states (among other things) that "when documents, such as employee handbooks and/or work rules are relevant to an investigation, Regions are instructed to obtain copies of these documents," and "if in examining such documents to investigate alleged violations, the Region notices unalleged provisions that may be facially unlawful, Regions are instructed to bring this potential issue to the attention of the Charging Party, who may amend the charge or file a new charge alleging that the previously unalleged rules are overbroad, discriminatory or otherwise unlawful. This notification to the Charging Party is part of the Agency's statutory duty of protecting employees from being subject to work rules that violate the Act by prohibiting engaging in Section 7 rights." GC Memo 1505, at 15.

[2] For example, my colleagues indicate that the "General Counsel's investigative procedure on which the Respondent's motion relies conforms to Section 10062.5 of the NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings." Casehandling Manual Section 10062.5 states in relevant part: "Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents . . . must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found. . . . If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge."

I respectfully disagree because I believe the Respondent has raised substantial questions that warrant the development of a factual record, and the Respondent's arguments should be addressed in the first instance by the judge, subject to potential post-hearing exceptions that may be considered by the Board. In the absence of a factual record, I do not reach whether or not the Respondent's allegations would establish that the Board lacks jurisdiction over the allegations concerning the Respondent's employee handbook.

It is not clear what occurred during the Region's investigation here. Yet, our statute and its legislative history clearly reveal that Congress intentionally divested the Board of authority to undertake investigations and to pursue alleged unfair labor practices at the Agency's own initiative. As stated in the Board's decision in *Allied Waste Services of Massachusetts, LLC*, 01–CA–123082, –126843, 2014 WL 7429200 (Dec. 31, 2014), our statute "does not give the Board authority to initiate its own unfair labor practice proceedings." Id. at *1. See also Sec. 10(b) (Board may issue complaints and conduct hearings into alleged unfair labor practices "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice"); *National Assn. of Manufacturers v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (Board cannot enforce the Act unless "outside actors" file an unfair labor practice charge, and "'neither the Board nor its agents are authorized to institute charges *sua sponte*'") (quoting Robert A. Gorman & Matthew W. Finkin, BASIC TEXT ON LABOR LAW, at 10 (2d ed. 2004)).[3]

The Board has reasonable latitude to investigate alleged unfair labor practices in a manner that may go beyond "the precise particularizations of a charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308–309 (1959). However, this authority to investigate matters "related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board," id, at 307, does not mean the Board has "carte blanche to expand the charge as [it] might please, or to ignore it altogether." Id. at 309 (internal quotations omitted). See also *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

In short, the Respondent here argues that the Board improperly played an affirmative role that caused the complaint's unfair labor practice allegations to exceed the scope of the original charge filed with the Board. The General Counsel relies on *Petersen Construction Corp.*, 128 NLRB 969, 972–973 (1960), which suggests it is irrelevant "that the initial impetus to remedy [an] additional unfair labor practice may have originated in [a] Regional Office." See also *Earthgrains Co.*, 351 NLRB 733, 739 fn. 25 (2007). I believe the judge should resolve these competing arguments in the first instance based on an evidentiary record to be developed in the hearing. Accordingly, I respectfully concur in the denial of Respondent's motion to dismiss.

Dated, Washington, D.C. February 17, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[3] The earliest Wagner Act legislation, as introduced, would have given the Board broad authority to address matters at the Agency's own initiative. These bills stated:

> Whenever *any member of the Board, or the executive secretary, or any person designated for such purpose by the Board, shall have reason to believe, from information acquired from any source whatsoever*, that any person has engaged in or is engaging in any such unfair labor practice, he shall *in his discretion* issue and cause to be served upon such person a complaint. . . . Any such complaint *may be amended by any member of the Board or by any person designated for that purpose by the Board at any time prior to the issuance of an order based thereon; and the original complaint shall not be regarded as limiting the scope of the inquiry*.

S. 2926, 73d Cong. § 205(b) (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act of 1935 (hereinafter "NLRA Hist.") at 6 (emphasis added); H.R. 8434, 73d Cong. § 205(b) (1934), 1 NLRA Hist. at 1133 (emphasis added). By the time the NLRA was enacted, Congress had eliminated the Board's power to initiate or expand unfair labor practice proceedings at the Board's initiative, as reflected in the express limitation set forth in Sec. 10(b) (which is quoted in the text). Cf. Sec. 11(1) (permitting Board subpoenas regarding a "matter under investigation or in question").